Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-539

Supreme Court of the United States

OCTOBER TERM, 1980

HAZEL MICHAEL TALBERT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a defendant be required to stand trial and a conviction of conspiracy be sustained, under the Fifth Amendment, U.S. Constitution, where no rationally persuasive evidence of the conspiracy, as distinguished from the substantive crime, was presented to the indicting grand jury?

2. Where a defendant shows to the trial court a strong probability that no evidence of a crime that he is charged with was presented to the grand jury that indicted him, does the trial court then have a duty, under the Fifth Amendment or pursuant to the supervisory power of this Court in federal criminal cases, either to examine the transcript of the grand jury proceedings, or if none exists, to hold an evidentiary hearing in order to determine whether any rationally persuasive evidence of the crime was presented to the grand jury?

PARTIES TO PROCEEDING IN COURT BELOW

The only parties to the proceeding in the U.S. Court of Appeals for the Fifth Circuit below are those named in the caption of this Petition.

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No. 80-539

HAZEL MICHAEL TALBERT,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OPINIONS BELOW

Neither the U.S. District Court for the Northern District of Georgia nor the U.S. Court of Appeals for the Fifth Circuit issued an opinion in this case, and accordingly no opinions are reported officially or unofficially. The judgments of the Courts below are reproduced in the Appendix to this Petition, *infra.*

GROUNDS FOR JURISDICTION OF THIS COURT

A. The judgment of the U.S. Court of Appeals below is dated and was entered June 9, 1980. See Appendix, *infra.*

B. A timely petition for rehearing was denied by the U.S. Court of Appeals below on August 4, 1980. See Appendix, *infra.*

C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1); 18 U.S.C., Section 3772; and Rule 20.1-20.4, Rules of the Supreme Court of the United States (adopted April 14, 1980, effective June 30, 1980), which prescribes (in a criminal case of a federal court of appeals) a 60-day period from the denial of a timely petition for rehearing in which to file a petition for writ of certiorari in this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth Amendment, U.S. Constitution, and 18 U.S.C., Section 371 (Conspiracy to commit offense or to defraud United States); 18 U.S.C., Section 1005 (Bank entries, reports and transactions); and 18 U.S.C., Section 1014 (Loan and credit applications generally; renewals and discounts; crop insurance). The statutory provisions are set forth in the Appendix, *infra.* The Fifth Admendment, U.S. Constitution, provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner was originally indicted May 26, 1978, together with three other co-defendants. The 16-count indictment charged the defendants with conspiring to defraud, and with defrauding the National Bank of Gwinnett County, Georgia, (hereinafter "the Bank") in regard to three loans: (1) the so-called Sparc loan ($100,000) of July 14, 1977; (2) the so-called Pianka loan ($14,000) of July 15, 1977; and (3) the so-called Talbert d/b/a HMT Industries loan ($15,000) of June 30, 1977.

The grand jury that returned this first indictment went out of existence, and on June 27, 1978, a second grand jury returned a 17-count superseding indictment basically charging the same offenses as the first, but adding two new crimes: (1) kidnapping; and (2) conspiracy to obstruct justice. One defendant, Pianka, was dropped, but two new defendants were added. The first indictment was thereupon dismissed June 29, 1978.

As a result of dismissals by the Government and judgments of acquittal granted by the trial judge, all defendants were dismissed from the case prior to submission to the jury except Petitioner Talbert.[1] As to Petitioner, the Government dropped its kidnapping charge prior to trial and the trial judge directed judgments of acquittal on all other substantive charges plus the charge of conspiracy to obstruct justice. Petitioner's case went to the jury only on three conspiracy counts: (1) Count One, charging a conspiracy among

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[1] None of Petitioner's co-defendants was adjudged guilty of any offense except Elizabeth Hogg, a discharged banker with the Nationa Bank of Gwinnett County, Ga., who pled guilty before trial to an information superseding the second indictment pursuant to a plea bargain, and became the Government's chief witness at trial.

Petitioner, ex-banker Elizabeth Hogg and a Mr. Howell to embezzle and misapply funds of the Bank concerning the Sparc $100,000 loan of July 14, 1977; (2) Count Three, charging a conspiracy between Petitioner and former co-defendant Elizabeth Hogg to make false statements to the Bank concerning the Pianka $14,000 loan of July 15, 1977; and (3) Count Four, charging a conspiracy between Petitioner and Hogg to make false statements to the Bank concerning the Talbert d/b/a HMT Industries $15,000 loan of June 30, 1977.

The jury failed to reach a verdict on the Sparc and Pianka loan conspiracy charges, but found Petitioner guilty on Count Four of a conspiracy with Hogg to make false statements concerning the Talbert d/b/a HMT Industries loan. A judgment of guilty on that charge was entered by the District Court below on October 31, 1978. The Court of Appeals below affirmed *per curiam* without opinion June 9, 1980.

The gist of the conspiracy charged in Count Four of the second indictment is that Petitioner and Hogg conspired and agreed to make false statements to the Bank concerning the June 30, 1977, HMT Industries loan by pledging phony collateral at a non-existent address. Thus, the only overt act alleged in support of the conspiracy charged in Count Four is that Talbert "made a false statement" on the HMT loan application "by pledging certain collateral located and stored at 6295 Buford Highway, Doraville, Georgia, knowing that there was no such collateral at said location."

At trial the Government produced evidence from an F.B.I. agent that the HMT loan was based on a security agreement purporting to bear Petitioner's "signature" and pledging inventory located at 6295 Buford Highway, Doraville, as collateral for the loan; that the

F.B.I. agent's investigation disclosed no inventory at that location, which was a vacant lot, and that the address itself was a phony address according to post office records. The Government also produced evidence from other witnesses that Petitioner received all the proceeds disbursed from the HMT loan and used them to buy a Mercedes car. But there was no evidence at trial—except from Hogg testifying as a Government witness—of any conspiracy or corrupt agreement between customer Talbert and banker Hogg concerning the phony HMT collateral or any other aspect of the HMT loan. All the evidence concerning any collusion between Petitioner and Hogg regarding the HMT loan came from the lips of Hogg and only from her lips. Without her testimony, the evidence simply showed a false security agreement bearing Talbert's "signature" pledging non-existent collateral. It was only Hogg's testimony that she prepared the security agreement and "may" have forged Petitioner's signature to it, and that she acted pursuant to his directions, which afforded any basis for a finding of conspiracy.

The significance of this is that the second grand jury that indicted Petitioner did not hear any evidence from the lips of Hogg. Hogg did testify before the first grand jury and a 147-page transcript of her testimony was supplied to Petitioner before trial. But Hogg's testimony before the first grand jury concerned only the later Spare and Pianka loans made in July, 1977, and did not refer to the earlier HMT loan at all. As the Government admitted in the Court of Appeals below (pp. 2-3, Government's response to petition for rehearing):

> "Furthermore, the 147 page transcript of Elizabeth Hogg, of which defense counsel makes so

> much, contains no references at all to the subject matter of Count 4 of the superceding indictment."

The second grand jury that indicted Petitioner on Count Four heard only one factual presentation from only one witness—the F.B.I. agent who testified at the trial.[2] This F.B.I. agent was sworn and then gave a short, approximately 10-page summary of Hogg's 147-page testimony before the first grand jury. It is fair to assume he also testified to much of what he later testified to at trial. But the bald, inescapable fact is that neither his summary of Hogg's prior testimony, which did not make any reference to the HMT loan, nor his own testimony (as demonstrated at trial) could have provided any substantial or rationally persuasive evidence upon which to base a charge that Hogg and Petitioner conspired together concerning the HMT loan. Indeed, Hogg's failure before the first grand jury in May, 1978, to implicate herself and Petitioner as conspirators concerning the June 30, 1977, HMT loan (or concerning several earlier loans made to Petitioner months before the HMT loan), while freely testifying about corrupt agreements and conspiracies with Talbert in regard to the later Sparc and Pianka loans made in July, 1977, gives rise to a strong inference that there was in fact no conspiracy regarding the HMT loan.[3]

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[2] The Government admitted in the District Court below that: "The only factual presentation made [to the second grand jury] was the sworn testimony by the F.B.I. agent which included, but was not limited to, the summary of the testimony of Elizabeth Hogg." (Paragraph 2, Government's Response to Defendant's Motion for New Trial, Pleading Record Volume 2, p. 275.)

[3] In fact, at trial Hogg admitted on cross-examination that she believed the HMT loan collateral to be valid collateral and to be actually located on Bufford Highway, Doraville, at the time the loan was made on June 30, 1977. (Transcript, p. 629.)

In the District Court Petitioner repeatedly attempted (by motions to produce the transcript of the second grand jury's proceedings or in the alternative to hold an evidentiary hearing, to dismiss the indictment, and for a new trial) to persuade the trial judge to make a simple inquiry as to whether *any* rational evidence at all was presented to the second grand jury concerning the charge he now stands convicted of. All these motions were denied, but the Government nevertheless out of fairness (perhaps prompted by the fact that no transcript of the second grand jury proceedings was made) provided the information recited above—without, of course, conceding that there was no evidence concerning Count Four presented to the second grand jury. However, the Government never identified or described any evidence supporting Count Four that was presented to the second grand jury, and Petitioner respectfully submits that the complete absence of any evidence before the second grand jury as to the conspiracy alleged in Count Four regarding the HMT loan is logically inescapable.

ARGUMENT FOR ALLOWANCE OF WRIT

This case represents the next step beyond the situation presented in *Costello* v. *United States,* 350 U.S. 359 (1956), a "step beyond" which Mr. Justice Burton anticipated and which prompted him to issue his caveat in his concurring opinion in *Costello,* 350 U.S. at 364 *et seq.*

This Court decided in *Costello* that an indictment founded solely on hearsay evidence does not run afoul of the Fifth Amendment, U.S. Constitution, which requires that all serious federal crimes be charged only

by a grand jury. One of the historic purposes of a grand jury, of course, is to provide an independent body which will afford citizens protection from arbitrary, vindictive or unfounded charges that the King in England or the Executive in this Nation might be motivated to make. No doubt it was this aspect of the grand jury system which explains why the system was expressly included in our Bill of Rights in the early days of our history. But being independent, and composed of everyday citizens, grand juries historically have been non-technical or laymen bodies operating free from the niceties and restraints of common law rules of evidence, one of the most difficult of which, as all law students will agree, is the hearsay rule and its multiple exceptions. Hence this Court concluded in *Costello* that grand juries are not restricted to indicting only on the basis of competent, i.e., legally admissible, evidence as defined by the legal rules of evidence, and that an indictment founded on substantial, rationally persuasive hearsay testimony is thus not legally defective. In effect, the Court's ruling in *Costello* confirmed the independence of grand juries from the Executive by freeing them from undue reliance on the legal learning of prosecuting attorneys.

But to extend *Costello* beyond its holding by saying that *Costello* precludes any inquiry whatsoever into the basis for grand jury action is another matter. To hold that grand juries can indict on the basis of no evidence at all (i.e., no inquiry can ever be made as to the evidence presented to a grand jury) not only creates a possible new engine of oppression, it also renders grand juries more amenable to being used as mere "rubber stamps" by over-zealous prosecutors. This, indeed, is what many commentators and observers believe is actually happening in our legal system

today. See M. Frankel and F. Naftalis, *The Grand Jury* 22-23 (1977).

A case in point is the recent one of *United States* v. *Helstoski,* 442 U.S. 477, 479-480 (1979), where the "regular practice" of the U.S. Attorney's office in New Jersey is described under which the accused in that case was investigated by nine different grand juries, no one of which heard all the evidence. Significantly, the accused in that case appeared before several of those grand juries, none of which indicted him, but was finally criminally charged by the ninth grand jury to whom only excerpts from his prior testimony were read. See also *Helstoski* v. *Meanor,* 442 U.S. 500, 503 (1979). The District Court in *Helstoski,* under these circumstances and because improper evidence was alleged to have been presented to the indicting grand jury, did make inquiry into the basis for the indicting grand jury's action, leading to rulings which came before this Court and which ultimately resulted in the dismissal of the indictment in that case prior to any trial.

As Mr. Justice Burton stated the matter in his concurring opinion in *Costello,* 350 U.S. at 364:

> "* * * it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

Similarly, Judge Learned Hand in the Court of Appeals below in the *Costello* case agreed that if "no evidence had been offered that rationally established

the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." 221 F.2d 668, 677.

Petitioner respectfully submits that the time is ripe for this Court to revisit the broader problems posed by the *Costello* decision of 1956—not in the narrow context of *Costello's* holding that indictments based on hearsay evidence are proper, but in the context of the misuse of *Costello* to preclude all inquiry into the basis for grand jury action even where it is shown that the grand jury, receiving as it so often does now only excerpts or summaries from prior grand jury testimony, may have acted to make charges not supported by any rational evidence whatsoever. When a grand jury blindly renders an indictment drawn by the prosecuting attorney without any rational evidence to support the charge, it should be deemed to forfeit or abdicate its privileged immunity from judicial scrutiny. The petition for writ of certiorari in this case should be granted.

Respectfully submitted,

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AC 305 444-7367

October 3, 1980

APPENDIX

APPENDIX A

JUDGMENT OF U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. CR 78-151A
Criminal Indictment

UNITED STATES OF AMERICA

vs.

HAZEL MICHAEL "MICKEY" TALBERT

On this 31st day of October, 1978, came the attorney for the government and defendant appeared in person and with counsel, Arthur V. Stark, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiring to commit offenses against the United States, to-wit; knowingly making a false statement to F.D.I.C. bank, in violation of Sections 1005 and 1014, Title 18 United States Code, all in violation of Section 371, Title 18 United States Code as charged in count four of the indictment and the court having asked defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS.

IT IS FURTHER ORDERED that the defendant be allowed to make appeal bond in the amount of $10,000.00, with security to be approved by the United States Magistrate.

IT IS ORDERED that the clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CHARLES A. MOYE, JR.
United States District Judge

Filed in Clerk's Office
November 7, 1978
Ben H. Carter

By: /s/ JANET S. REED
Deputy Clerk

APPENDIX B

JUDGMENT OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VS.
HAZEL MICHAEL TALBERT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

(June 9, 1980)

Before VANCE, FRANK M. JOHNSON, JR. and THOMAS A. CLARK, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See *NLRB* v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970).

APPENDIX C

ORDER DENYING REHEARING:

No. 78-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VS.
HAZEL MICHAEL TALBERT,
Defendant-Appellant.

On Petition for Rehearing

(August 4, 1980)

Before VANCE, FRANK M. JOHNSON, JR. and THOMAS A. CLARK, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/S/ FRANK M. JOHNSON, JR.
United States Circuit Judge

U.S. Court of Appeals
FILED: August 4, 1980
Gilbert F. Ganucheau, Clerk

APPENDIX D

18 U.S.C., SECTION 371

Section 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX E

18 U.S.C., SECTION 1005

Section 1005. Bank entries, reports and transactions.

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

APPENDIX F

18 U.S.C., SECTION 1014

Section 1014. Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * any bank the deposits of which are insured by the Federal Deposit Insurance Corporation * * * upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served this 3rd day of October, 1980, by mailing three copies, with first-class postage prepaid, to the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, and by also mailing three copies, with first-class postage prepaid, to Honorable William L. Harper, United States Attorney, United States Courthouse, 56 Forsyth Street, Atlanta, Georgia 30303 (attention Hon. C. Michael Abbott, Assistant U.S. Attorney). Pursuant to Rule 28.5, Rules of the Supreme Court of the United States, I expressly state that all parties required to be served, to-wit, the United States of America, have been served.

NEAL P. RUTLEDGE
Counsel for Petitioner